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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-

71-550

AMERICAN AIRLINES, INC.,
Petitioner,

and

ALLIED PILOTS ASSOCIATION,
Intervenor-Petitioner,

against

CIVIL AERONAUTICS BOARD,
Respondent,

and

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, American Airlines, Inc. ("American"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 23, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to the petition for certiorari filed by petitioner Allied Pilots Association ("APA"), at A12.* Orders Nos. 71-5-30 and 71-6-71 of the Civil Aeronautics Board, issued on May 7, 1971 and June 11, 1971, respectively, also appear in that Appendix at A32 and A25.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 23, 1971. A motion to stay the issuance of the mandate pending application to this Court for a writ of certiorari was denied by the Court of Appeals on August 3, 1971. This petition for certiorari was filed within 90 days of entry of the Court of Appeals judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Civil Aeronautics Board could properly ignore an agreement for the integration of pilot seniority lists reached between the surviving carrier in a merger and the majority representative of its pilots without mak-

* Upper-case "A" references are to the supplemental Appendix to the petition for certiorari filed by petitioner APA, which Appendix is adopted by petitioner American as if fully attached hereto. References followed by a lower case "a" are to the Joint Appendix prepared for the Circuit Court (which has been certified by the Clerk of that Court and filed with these petitions for certiorari). Upper case "R" references are to the transcript of the oral argument before the Circuit Court on July 14, 1971.

ing a finding that such agreement was not substantively fair and equitable.

2. Whether the Civil Aeronautics Board could properly order compulsory binding private arbitration of the integration of seniority lists of pilots of a merged and a surviving air carrier without any guidelines, despite the refusal of the majority representative of the surviving carrier's pilots to participate, and despite the willingness of all parties that the Board resolve the integration issues itself.

3. Whether, under the Federal Aviation Act, 49 U.S.C. §1486(a), an air carrier can obtain judicial review of Civil Aeronautics Board Orders compelling *de novo* arbitration of certain labor disputes without having initially challenged the legality of general labor protective provisions imposed by the Board in approving a merger of that air carrier.

Statutory Provisions Involved

Administrative Procedure Act §556(b) (1964).
Federal Aviation Act, 49 U.S.C. §§1302 *et seq.* (1964).
Railway Labor Act, 45 U.S.C. §§151, 151a and 152 (1964).

The pertinent text of these statutory provisions is set forth in the Appendix to the petition for certiorari filed by petitioner Allied Pilots Association, at A1.

Statement of the Case

On December 31, 1970 the Civil Aeronautics Board (the "Board") approved a merger of Trans Caribbean Airways, Inc. ("TCA") into American

> "* * * subject to the labor protective conditions established by the Board in the *United-Capital Merger Case*, 33 CAB 307 (1961)" (41a, 136a-141a).

For several months prior to the effective date of the merger, March 8, 1971, American had engaged in extensive negotiations with representatives of TCA flight crews and with the exclusive bargaining representatives of its own pilots and flight engineers in order to determine questions relating to the terms and conditions of employment of the former TCA employees with American after the merger. A Memorandum of Understanding was prepared and agreed upon by all parties to the negotiations on all issues with the exception of that portion of the Memorandum which provided the method of determining seniority list integration (155a). On this issue American was in agreement with its pilots, represented by the Allied Pilots Association ("APA") on an integration formula by which seniority was to be determined on the basis of length of service (155a). Under this formula each active TCA pilot would be treated for seniority purposes as if he had started flying for American on the date he started flying for TCA and was given the absolute right to bid the domicile base of his choice in the American Airlines system (153a). The Memorandum also provided that furloughed pilots were to be recalled on the basis of last furloughed, first recalled (155a).

American and APA executed the entire Memorandum of Understanding, dated February 4, 1971, and were subsequently joined by American's flight engineers and by the TCA flight engineers, represented by the flight engineers chapter of the TCA—Master Executive Council ("TCA-MEC") (142a). The TCA pilots, however, continued to insist upon other methods of seniority list integration and refused to agree to this part of the Memorandum. Acting on behalf of these pilots, the TCA-MEC, which was the local unit of the Airline Pilots Association International ("ALPA") that had represented the TCA pilots before the merger, on February 2 filed a petition to the Board asking that three-way arbitration be ordered to resolve all the pending seniority disputes, and for certain interim relief (143a).

Both American and APA opposed the TCA-MEC petition and asked the Board instead to determine whether the method of integrating seniority lists agreed upon by American and APA, after full negotiations with all parties, was "fair and equitable" (144a at pp. 24-25; 150a). On March 5 TCA-MEC again urged arbitration, but also attempted to show that the American-APA agreement was not fair and equitable (175a at pp. 2-10, 18-19). At the same time, TCA-MEC, noting APA's determined opposition to arbitration, suggested that "if APA is serious in its threat that it will refuse to arbitrate no matter what the Board says, the matter may as well" be determined by the Board (175a at p. 19). On April 13 TCA-MEC filed a motion for expedited action, again suggesting that unless an arbitration agreement was executed within 30 days, the Board set the matter down for hearing and decide it (204a).

In the face of these positions, the Board issued Order No. 71-5-30 on May 7. The Order required American to attempt to obtain agreement of all the parties to an arbitration, including implementation of procedures for that arbitration. Failing agreement, American was to itself make all provisions necessary to proceed with the arbitration (A39-40). Furthermore, in the event that any group of employees refused to participate in the arbitration, American was to adopt procedures that would insure "to the maximum feasible extent under the circumstances, that the determination rendered by the arbitral tribunal shall fully consider the interest of such employees" (A40).

Although the Board's Order was directed only at American and did not purport to compel any employee representative to participate in the arbitration, it stated that the determination of the arbitrator was to be "final and binding upon all pilot and flight engineers of American Airlines [including the former TCA employees] as to which there exists a dispute with respect to seniority list integration * * *" (A40). The explicit reasons stated in the opinion for the Board's rejection of a resolution of the disputes by means of its own procedure, as requested by American and APA and agreed to by TCA-MEC, were that arbitration was "appropriate" and that "the Board lacks expertise in labor matters" (A37-38). Also, while the Board noted that TCA-MEC had taken the position that date-of-hire was not a fair and equitable plan, and that American and APA had argued that it was, it failed to resolve this issue, saying that "TCA-MEC need not accept this formula" (A38). As an affected party, under applicable court decisions it had "the right to arbitrate any bona fide dispute of a non-frivolous nature", and "such a dispute exists here" (A38).

On May 28, American filed a petition for reconsideration of the Board's Order (206a). In its petition American pointed out that it was impossible to obtain agreement of the parties to either an arbitration or the procedures necessary to implement such an arbitration; that there was no assurance that an arbitration proceeding would have any final and binding effect and that, to the contrary, holding an arbitration could only lead to further litigation and possible industrial strife; that substantial doubts existed as to the identity of all proper parties and their representatives; and that the precise issues to be submitted to arbitration had not been defined by the Board.

American's petition suggested strongly that the Board take the same action it had taken in the *North Atlantic Route Transfer Case,* 12 CAB 423 (1951); 14 CAB 910 (1951), upheld in *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (2d Cir. 1953), *cert. denied,* 346 U.S. 826, and decide the open question itself. More particularly, it requested the Board to appoint a hearing examiner in accordance with its Rules to conduct further preliminary proceedings in the matter, to identify the parties and their authorized representatives and to determine the extent, if any, to which the seniority provisions in the American-APA agreement were not fair and equitable (206a at p. 12). APA joined in this petition (219a), and TCA-MEC again indicated that it did not oppose resolution of the basic dispute by the Board itself (210a at p. 10), although it asked the Board to ignore the American-APA agreement in reaching its conclusion.

Nevertheless, the Board, on June 11, by Order No. 71-6-71, denied American's petition for reconsideration,

and ordered American to proceed to arbitration within ten days. Once again, although it observed that the former TCA pilots "do not oppose resolution of the dispute by the Board", the Board justified its choice of arbitration over its own resolution of the dispute by stating that "the Board does not consider it appropriate to entertain this dispute beyond directing compliance with the labor protective provisions * * *" (A26), that "seniority disputes are more appropriately resolved by arbitration than by the Board" (A26), and that "we find no merit to APA's contentions that arbitration is an inappropriate means for resolving seniority integration disputes" (A26, fn. 2). The Board also suggested the possibility of the parties seeking judicial review (A27).

The directive to American to arbitrate was substantially identical to Order No. 71-5-30 in that it required American itself to "arrive at appropriate and fair procedures for pursuance of such arbitration", but made no provision for compelling any interested party other than American to participate (A30). With respect to the issue to be arbitrated, the Board was equally vague. It made "clear" only that the "TCA pilots have a right to arbitrate the question whether a different or alternative plan for seniority list integration may be more appropriate" than that agreed on by American and APA (A29).

On June 18 American filed a petition in the Court of Appeals for the Second Circuit to review and set aside Board Orders Nos. 71-5-30 and 71-6-71 on the grounds that in promulgating these Orders, the Board had acted arbitrarily, in abuse of its discretion, and under the circumstances had improperly delegated its authority to a yet

undesignated private arbitrator. The jurisdiction of the Court of Appeals was invoked under Section 1006 of the Federal Aviation Act, 49 U.S.C. §1486 (1964). In conjunction with its petition, American also filed a motion for a stay of the second Order pending determination of its petition to review. American's motion was granted by the Court after oral argument heard on June 21.

On July 23, 1971, the Court of Appeals entered a judgment denying American's petition to review, holding that the Board could properly order arbitration of seniority integration disputes, that it was within the "range of reason" for it to order arbitration in this case and "[w]hat the Board can do, an arbitrator appointed pursuant to its order can likewise do" (A20). The Court also held that in any event, the time for challenging the arbitration clause of the labor protective provisions had expired before the filing of the petition to review. Subsequently, on August 3, 1971, the Court of Appeals denied American's motion to stay the issuance of its mandate pending application to this Court for a writ of certiorari.

Reasons for Granting the Writ

1. The Board's Orders, and the decision below upholding those Orders, raise significant and recurring questions with regard to the viability of negotiations as a means for resolution of seniority list integration disputes arising in the course of airline mergers.

The serious impact of the Board's Orders on the litigants in this case is obvious. The job security of thousands of pilots employed by American will be directly affected by the manner in which seniority list integration is ulti-

mately accomplished. But even more significant, the Board's failure to properly reconcile the policies of the Federal Aviation Act and the Railway Labor Act, and the acquiescence of the Court below in that failure, pose a serious threat that non-governmental compulsory arbitration will supplant negotiation as the means by which virtually all seniority list integration disputes between all types of airline employees will be resolved in future merger cases.

American and APA have urged from the beginning that the Board should consider first whether the collective bargaining agreement they concluded is a fair and equitable arrangement. Yet the Board not only chose to compel arbitration rather than to decide the issue itself, but also chose to say that the entire question of seniority list integration was to be submitted anew, as if no negotiations had occurred and as if no agreement had been reached. Even if these choices were within the Board's power, their exercise under the circumstances here was without justification. This Court has previously recognized that where an administrative agency has a choice between two courses of action, one of which would effectuate the policies of labor statutes involved, and one which would not, the agency is under a duty to consider the consequences of the alternatives and act accordingly. *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962). The Board's choices in this case seriously impair important and deep-rooted policies of the Railway Labor Act.

Under the Act, the favored method of dispute resolution is negotiation. The negotiation process, in turn, is committed to administration by the *majority* representative of the affected employees. 45 U.S.C. §152 *Fourth*. By ignor-

ing the agreement between American and the exclusive bargaining representative of its pilots, and, indeed, by implying that the arbitrator in the proceeding ordered by the Board also had the right to ignore it, the policy favoring majority representation was subverted, purportedly to protect approximately 150 of American's pilots against the other 3,300, *without any inquiry into the question of whether the agreement treated these employees fairly.* Thus, in effect the Board decreed that *de novo* compulsory arbitration is proper if any minority, no matter how small, fails to agree to any plan, no matter how fair.*

This viewpoint was taken by the Board and tacitly ratified by the Court below without any apparent consideration of its effect in future merger situations. The knowledge that *de novo* compulsory arbitration is inevitable in the absence of complete agreement by all groups will effectively impair the motivation of both majority and minority groups to reach reasonable agreements during negotiations under the Board's labor protective conditions. The negotiations which were held in this dispute provide an apt case in point. APA took a position in negotiations in favor of a date-of-hire concept, one which could hardly be characterized as extreme, and both APA and American made important concessions which, in all probability, would not have been made had compulsory arbitration been contemplated. Because the Board has now held that the re-

* During oral argument counsel for American pointed out that the Board's rationale ("Any affected party has the right to arbitrate any bona fide dispute of a non-frivolous nature" A38) would mean that *de novo* arbitration could have been compelled by any dissatisfied individual in this case even if TCA-MEC had agreed with APA and American. (pp. 12-13R) Neither counsel for the Board nor TCA-MEC answered this contention, and the Court ignored it in its opinion, as it ignored the entire argument.

sults of these negotiations are basically irrelevant, the parties in future merger cases, anticipating arbitration and the tendency of many arbitrators to seek the middle ground, are likely for strategic reasons to hold firmly to one extreme position without compromise as a means of retaining the most favorable position from which to arbitrate.

Yet both the Board and the courts, in prior situations, have recognized the chaotic effect which *de novo* compulsory arbitration at the behest of dissident minority groups may have on the ability to reach a fair negotiated settlement. Thus, in *Outland* v. *CAB,* 284 F.2d 224 (D.C. Cir. 1960) (Burger, J.), the integration of seniority lists was accomplished by a negotiated settlement of the parties. The Board refused to set aside the agreement despite the complaint of a substantial minority of individuals who alleged that the agreement was unfair and inequitable. The Court of Appeals similarly recognized the significance of the negotiations between the carrier and its employees' collective bargaining representative and confirmed the Board's action. That a minority union, rather than a substantial group of individuals, is involved should make no difference, either under the language of the protective provisions or the policy considerations involved in the various statutes that must be accommodated.

Certainly, proper deference by the Board to the agreement reached by American with the majority representative of its combined pilot group would have gone a long way towards encouraging negotiations in future merger situations, for the reasons discussed above. Furthermore, resolution of the dispute by the Board itself (discussed below) would have the supplementary advantage of en-

abling the Board to develop a consistent approach to these problems which would, of necessity, encourage constructive negotiations by narrowing the range of bargaining subjects and by affording fairly predictable results. These goals can hardly be accomplished by submission of all seniority disputes to open-ended standardless *de novo* arbitration.

Review of this case by the Supreme Court will determine whether negotiations between employee groups and air carriers on the important issues of seniority list integration are to be meaningful or a charade. Despite the Board's professed preference for negotiations, its Orders in this case may result in compulsory arbitration for every serious seniority list integration dispute arising among all types of airline employees in merger cases.

2. The decision below raises significant questions concerning the extent to which an administrative agency can delegate its responsibilities to a private arbitrator.

Under the Federal Aviation Act, 49 U.S.C. §1301 *et seq.* (1964), the Civil Aeronautics Board is invested with the responsibility to determine whether particular airline mergers are consistent with the public interest, and, if so, to fashion conditions for approval which are just and reasonable. The extent to which this responsibility may be delegated to a non-governmental entity is an issue of great significance to the validity of future actions taken by the Board and other administrative agencies, and is one which is squarely raised by review of the instant case.

The degree of delegation sanctioned by the Board in this seniority list integration dispute is unique for several

reasons. First, the subject matter of the delegation is not, as it has been in many other cases, a mere exercise in fact-finding, or the application of a given formula to a particular situation. Instead, the Board has vested in an unknown arbitrator the power to fashion the general principle which will determine the relative rights of thousands of pilots, by delegating the authority to resolve the "entire question of the appropriate method of seniority list integration" (A29). Presumably, the arbitrator would have the authority under this delegation to decide any issue he desires, as long as it involves "seniority list integration", and any such determination would be final and binding on everyone. The arbitrator could seemingly even come up with an integration formula of his own which bears no relation to the plans advanced by the parties, and this plan would be final and binding.

Furthermore, so broad and encompassing is this delegation that, as counsel for the Board indicated at the oral argument before the Court of Appeals, the parties would be unable to obtain any meaningful review of any arbitral determination by the Board, the agency charged with responsibility for fashioning merger conditions, in the absence of fraud, bad faith, or procedural unfairness (pp. 48-50 R). This abdication by the Board of virtually any control over its delegation is even more remarkable when it is realized that the factors which will come into play in resolving this dispute are in a sense distinctive to the airline industry. For example, the arguments made by TCA-MEC to the CAB with respect to its proposals emphasized the kinds of aircraft flown by the former TCA pilots and their contribution to building up the TCA routes

(175a at pp. 4, 6, 7, 8), while on the other hand, the APA advanced arguments based upon the relative economic conditions of the airlines (144a at p. 7). Another issue, particularly relating to the furloughed pilot question, involves, on the one hand, accusations of improper scheduling by TCA (175a at pp. 13-14) and, on the other, contentions that much of the flying done by the TCA furloughed pilots was temporary military (MAC) flying (161a at pp. 2-5). These are issues that the Board itself deals with all of the time in airline merger cases, and indeed, are issues which it has a responsibility to cope with under the Federal Aviation Act in order to assure that mergers approved by it are consistent with the public interest.

Another factor in this case that makes such broad unfettered delegation to a private arbitrator peculiarly inappropriate is the fact that a major party to the dispute, the APA, which made important concessions during the negotiations, has opposed arbitration from the outset. On the other hand, TCA-MEC has indicated a willingness to participate in and be bound by resolution of the dispute by the Board itself. Lacking a consensual basis for arbitration and possessing an alternative at least palatable to all parties presently on the surface, such broad delegation by the Board becomes indefensible. Arbitration can serve a valid function in a non-consensual situation only if there is no practical alternative for resolving the dispute.

In addition the Board compounded its error, and further burdened the utility of its proposed arbitration, by placing on one party to the dispute, American, the obligation to determine the identity of the employee representatives with

whom it is to arbitrate, the responsibility for selection of the arbitrator, framing of the issues, location of the arbitration, and many other questions which would normally be left to agreement of parties in a totally consensual situation. This action raises many serious problems which the Court below failed to deal with. For example, if American agreed only with TCA-MEC on all of these issues, would it be in compliance with the Board Order? If American disagreed with TCA-MEC on an appropriate method for choosing an arbitrator, or no one was selected on the basis of the method agreed on, would anyone named by American, so long as he had no relation to the parties, be acceptable? And if American and TCA-MEC could not agree on a definition of the issues, could this properly be left to the arbitrator—or to American?

These questions illustrate that broad delegation by an administrative agency without any guidelines, to a private arbitrator, of essentially rule-making powers within that agency's area of expertise, is indefensible where the arbitration must proceed on a non-consensual basis and where the agency has a practical alternative. It is no answer to say that American's acceptance of the labor protective provisions disposes of any questions it may raise at this time. Even if the labor protective provisions constituted an agreement on the part of American to arbitrate seniority list integration disputes, implicit in any such agreement would be that the Board would exercise its statutory responsibilities and provide clear and proper guidelines for the arbitrator's ultimate determination. In addition, any agreement by American to arbitrate could hardly have constituted an agreement that American would assume the

sole responsibility for fairness of the arbitration procedures should the parties fail to agree.

Thus the Court below erred in making and giving weight to a finding that the time for challenging the legality of the arbitration provision in the Order approving the merger had expired before the filing of the petition for review. Indeed, this contention was not raised by the Board in either of its Orders and thus should have been ignored by the Court below. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 169 (1962); *Trailways of New England, Inc.* v. *C.A.B.,* 402 F.2d 926, 931 (5th Cir. 1969). Moreover, the Board, in denying American's petition for reconsideration, virtually invited judicial review of its Order directing arbitration (A27).

In any event, at no time has American contended that the Board lacked *power* to delegate any conceivable dispute to arbitration. American's position is that considering all of the circumstances *of this case,* the Board acted beyond its powers and abused its discretion. If the Court of Appeals was correct in its view that challenges to an unforeseeable *application* of the protective provisions must be made when the provisions themselves are imposed, a carrier would be unable to challenge any delegation by the Board, regardless of the circumstances, and regardless of how broad that delegation might be, without challenging the entire merger for which it sought the Board's approval.

The breadth of the delegation that the Court below has permitted the Board in this case is sharply focused by its statement that "what the Board can do, an arbitrator can likewise do" (A20). As a generalization, this statement is,

of course, patently incorrect. For example, no one would seriously contend that the Board could delegate its responsibility to approve or disapprove of an airline merger to a private arbitrator. Indeed, the Administrative Procedure Act, 5 U.S.C. §556(b) (1964), providing for the taking of evidence by the agency or hearing examiners, and the Board's own Rules and Regulations, as set out in 14 C.F.R. §302.27, evidence a careful design to assure that any delegation by an administrative agency of any of its functions be under the control and supervision of the agency itself.

There are significant differences between agency determination and resolution by private arbitration which the Court below apparently overlooked. Determination of this issue by the Board offers established procedures, expertise in the airline industry, and a cognizance on the part of the Board that its actions in this case will have precedential effect on future mergers and the way in which it administers the Federal Aviation Act. In addition, as pointed out above, an arbitral determination of this dispute virtually eliminates any possibility of review on substantive grounds. This might not be the case if the agency itself resolved the issue. To place governmental decision making and private compulsory arbitration on an equal footing, as done by the Court below, ignores these differences and opens the door to almost unlimited delegation by administrative agencies of their responsibilities. Review of this case by the Supreme Court will afford an opportunity to delineate the reasonable boundaries of agency delegation for these litigants, for other parties before the Civil Aeronautics Board, and for other administrative agencies in the federal system.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR THE RESPONDENT MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix of Petition in No. 71-489, page A12-A24)[1] is reported at

[1] The numbered pages of the Appendix of the Petition in No. 71-489 are referred to hereinafter as App. A1, App. A2, etc.

445 F.2d 891. The findings and orders of the Civil Aeronautics Board (App. A25-A40) are not yet reported.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether the Board acted reasonably in ordering arbitration in this case.

3. Whether the Board in ordering such arbitration may bind an employee group which has actively participated in the Board proceedings leading to the issuance of the order.

STATUTES INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, as amended (the "Act"), the Administrative Procedure Act, the Railway Labor Act, the Reorganization Plan No. 3 of 1961, 26 F.R. 5989, and the Regulations of the Civil Aeronautics Board, are set forth in the Appendix to the Petition for Certiorari in No. 71-489, at pages A1-A11.

In addition, 45 U.S.C. 157, First (Sec. 7, First, of the Railway Labor Act) provides:

> "First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a

board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

STATEMENT

In lieu of a complete restatement of the factual background of the present controversy, Respondent Master Executive Council of the Pilots of Trans Caribbean Airways (TCA-MEC) accepts and endorses the statement thereof by Respondent Civil Aeronautics Board (Board) in its Brief in Opposition. There are, however, two points which require clarification.

First. The Petitions of American Airlines, Inc. (American) in No. 71-550 and of the Allied Pilots Association (APA) in No. 71-489 may create the impression that all three parties (American, APA and TCA-MEC) sought to have the Board, rather than an arbitrator, integrate the seniority lists. In fact, American did not propose a proceeding to integrate the seniority lists, but rather a proceeding to determine what *procedures* should be followed for resolving any outstanding disputes. Record 206a, p. 12.[2] This issue had already been decided in the order of the Board approving the merger, with arbitration chosen by the Board. TCA-MEC vigorously objected to American's proposal. Record 210a, p. 2. While TCA-MEC reluctantly indicated its willingness to have the Board itself integrate the seniority lists, this was done only after American had refused to comply with the arbitration condition it had voluntarily accepted, and after

[2] "Record" refers to the Joint Appendix filed by the parties in the court of appeals. The Joint Appendix has been filed with the Clerk of this Court.

American and APA had seemingly indicated a willingness to be bound by a Board integration. Record 210a, pp. 10, 11. Moreover, TCA-MEC's willingness was, in terms, predicated on the delays incident to "APA['s] . . . threat that it will refuse to arbitrate no matter what the Board says." Record 175a, p. 19.

Second. Although TCA-MEC does not propose here to recite or argue the facts relating to the merits of the seniority question, it must take vigorous exception to the statement in American's Petition (Pet. No. 71-550, 15) that "important concessions" were made by APA during the abortive negotiations. The facts are directly contrary —despite several concessions made by TCA-MEC, the APA adamantly adhered to its original position on the seniority issue throughout the negotiations.

REASONS FOR DENYING THE WRIT

Petitioners concede that the Board has power to impose protective labor conditions in airline merger cases, including conditions for the integration of seniority lists. In our view, and in the view of the Board and the Court below, the basic issue on the merits of this litigation is whether the Board's choice of binding arbitration as the means of integrating the seniority lists of two merging carriers in the absence of agreement, as opposed to integrating the lists itself, was permissible as a proper exercise of its discretion. The court below found that the Board's choice of arbitration was a proper exercise of discretion in the circumstances. In the light of the requirements of Rule 19, Petitioners' plea that this Court review that determination is not a sufficient basis for invocation of this Court's power of discretionary review.

1. *No significant questions concerning national labor policy are raised by the Board's procedures or by the Board's refusal to consider an agreement between two parties to a tripartite labor dispute.*

Petitioner APA argues (Pet. No. 71-489, 9) that the agreement between APA and American (APA-AA agreement), allegedly a valid collective bargaining agreement within the meaning of the Railway Labor Act, was unlawfully "ignored" by the Board.

Petitioner's entire argument is erroneously founded on the premise that the procedures established by the Board for negotiation, agreement, and arbitration between employee groups (plural) and the employer are or should be the same procedures as those provided in the Railway Labor Act.[8]

The Board's undisputed power to impose protective labor conditions derives from Section 408 of the Federal Aviation Act, 49 U.S.C. 1378, and not from the Railway Labor Act. Although, as we shall show, the Board's labor conditions are consistent with the national labor policy, the conditions make provision for negotiations between two or more employee groups (which usually have conflicting interests) and the employer, rather than bi-partite negotiations between employee representatives and the employer as contemplated in the typical case arising under Section 2, Fourth, of the Railway Labor Act.

The fact is, therefore, that no agreement with respect to the American and TCA Pilots has been reached which meets the requirements of Section 3 of the Board's protective conditions. The APA-AA agreement, whether or not it otherwise complies with the Railway Labor Act,

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[8] Section 2, Fourth, of the Railway Labor Act (45 U.S.C. 151a) provides for collective bargaining with the employer by representatives of the employees, and further provides "that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act." Section 7 (45 U.S.C. 157) provides for arbitration of disputes which cannot be settled by conference, by the appropriate adjustment board, or through mediation.

has not been approved by the TCA Pilots, and thus is not in compliance with the Board's labor conditions. It is at best a proposal which failed. Moreover, the conduct of the petitioners surely discloses that the APA-AA agreement is a nullity. The "agreement"—or more accurately the proposal—was expressly drafted as a tripartite agreement and was tendered to the TCA-MEC for signature and acceptance. Under Petitioners' theory, this was an unnecessary gesture. In fact, of course, it was not. It was rather a recognition of their obligations under the Board's labor protective provisions.

It is also premature, and therefore erroneous, for Petitioner to say that the Board has "ignored" the APA-AA agreement. In the absence of the necessary tripartite agreement contemplated by the Board's conditions, the procedures provided by Sections 3 and 13 thereof call for arbitration of the dispute, at which time the merits of the seniority dispute will be considered. As the Board has clearly pointed out (App. A29), at that time the APA-AA agreement can be put forward as a proposed solution of the dispute. At that time the agreement presumably will receive such consideration as the merits of the proposal may warrant.

Thus, to put it bluntly, the two-party agreement is *irrelevant* at the present *procedural* stage of the dispute. It follows that the failure of the Board to give "weight" to the agreement was not adverse to or in conflict with the national labor policy, and that the lower court's decision upholding the Board's action does not raise questions warranting review by this court. On the contrary, the Board's action is consistent with national labor policy. As this court made clear in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), national labor policy favors collective bargaining and arbitration. The Board's conditions are wholly consistent with this policy, and the

Petitioner's objections relate to minor procedural objections and red herrings introduced by Petitioner itself.[4]

It must be noted that Petitioner's objection (that the Board as a matter of law must itself resolve the dispute rather than compel arbitration) is trivial at best. In the absence of voluntary agreement to arbitrate, settlement of the dispute by the Board is just as compulsory as settlement by compulsory arbitration. Moreover, a charge that the Board failed to give weight to the two-way agreement *prior* to the consideration of the seniority dispute on its merits represents an objection merely to the question of *timing*, since the Board has said (App. A29) that the agreement *can* be considered by the arbitrator when the merits of the dispute are reached. Thus, consideration of the agreement has merely been deferred to a later stage, and no important question of national labor policy is involved.

2. *Contrary to Petitioner American's assertion, the viability of negotiations as a means of settling disputes in airline merger cases is not impaired by the decision below.*

Petitioner American argues (Pet. No. 71-550, 9-13) that the procedures adopted by the Board in this case and approved by the court below fail to reconcile the policies of the Federal Aviation Act and the Railway Labor Act, and therefore "pose a serious threat that non-governmental compulsory arbitration will supplant negotiation as the means by which virtually all seniority list integration disputes between all types of airline employ-

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[4] *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2, 1966), cited by Petitioner APA (Pet. No. 71-489, 9), is not to the contrary. The merger there was not subject to the approval of a regulatory agency vested with authority to impose just and reasonable protective conditions as the circumstances may require. The question before the court in *McGuire* involved the construction of a pre-existing collective bargaining agreement in the light of national labor policy.

ees will be resolved in future merger cases." The argument is founded on the contention that the Board, before opting for compulsory settlement of the dispute, must first consider the collective bargaining agreement between the carrier and the majority representative of the employees.

American's argument, which tries to force the present case into the mold of the Railway Labor Act, fails to recognize that airline merger cases give rise to labor disputes which are unlike the typical case arising under that Act. Under the Railway Labor Act negotiation and agreement between the collective bargaining representative and the employer is a proven and sound method of resolving disputes. But in airline merger cases a seniority labor dispute is a tripartite dispute involving the surviving carrier and two formerly separate employee groups. The Board's standard labor protective conditions and its procedures in the present controversy properly recognize this important and practical consideration.

Contrary to the implication in the Petitions, the actions of the Board in the present case do not represent a departure from its past procedure—a procedure evolved from the consideration and disposition of numerous airline merger cases. The courts and the Board have both recognized in earlier cases that the procedures under the Railway Labor Act should not be routinely followed where two or more employee groups in a merger have conflicting interests. In *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19 (1953), the Board was confronted with an agreement between the carrier and the representative of one of the conflicting employee groups over the objections of the other group. The Board there held as follows (17 C.A.B., at 21-22):

> ". . . we interpret section 3 of the Board's order as requiring Braniff to negotiate with the two groups of dispatchers, and to submit to arbitration in the absence of a negotiated agreement. For the purpose

> of carrying out the provisions of section 3 of the order, it is immaterial as to who is the certified representative, within the meaning of the Railway Labor Act. For, regardless of which representative is certified, there will still remain a dissident group, and *we are unwilling to allow our protective conditions to be used as a means for allowing one group to dominate the other.*
>
> "The very purpose of the protective condition regarding integration of seniority lists is to insure that the merger will not unduly interfere with the seniority rights of the affected employees. Where, as here, Mid-Continent has disappeared as an entity, *it would frustrate our protective condition if the Braniff dispatchers were permitted to dictate the seniority rights of the Mid-Continent dispatchers.* Similarly, our protective condition would be defeated if we were to permit the Mid-Continent group of dispatchers to dictate seniority integration for the Braniff dispatchers. Accordingly, we have provided for negotiation and ultimate resort to arbitration, so as to protect the rights of both groups of employees" (footnotes omitted; emphasis added).

Similarly, in *Kent* v. *Civil Aeronautics Board*, 204 F.2d 263 (C.A. 2, 1953) *cert. den.* 346 U.S. 826, the court held that a collective bargaining agreement, made by the union bargaining agent of the carrier's employees, must yield to the paramount power of the Board to provide a solution which takes into consideration the conflicting seniority interests of both the majority and minority employee groups. These views of the court and the Board are inherently sound, and are not inconsistent with the Railway Labor Act and national labor policy of settling disputes by negotiation and arbitration.[5] In a sense, the

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[5] *Outland* v. *CAB*, 284 F. 2d 224 (1960) relied on by the Petitioner, is not to the contrary. The fact that the Board did not choose to look behind the collective bargaining agreement in that case does not require it to follow that course in all cases regard-

Board's actions go beyond the Railway Labor Act in recognizing the tripartite nature of the labor dispute. But in providing for collective bargaining between affected employees and the employer, and for arbitration if negotiations fail, the Board's protective conditions are consistent with national labor policy. *John E. Wiley & Sons* v. *Livingston, supra.*

In the absence of approval of the APA-AA agreement by TCA-MEC, it is patently unsound to argue, as American does (Pet. No. 71-550, 11), that the agreement, which has status only as the proposal of two of the three parties, *must as a matter of law* be acted on by the Board before any other procedural step could be taken.[6] We need not decide whether the Board lawfully could have given priority to the APA-AA proposal over all other proposals which might be considered by the arbitrator in the arbitration proceeding. But we submit that it is absurd to argue that the Board was guilty of legal error in refusing to give preferential priority consideration to one of many possible solutions in advance of the arbitration proceeding.[7]

American seeks to establish the importance of the issue it raises by expressing fears (Pet. No. 71-550, 11)

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less of circumstances. But of even greater importance is the fact that in *Outland*, unlike the present case, the representative of the minority had agreed to the manner of integration. For what American describes as an "integration of seniority lists . . . negotiated . . . by the parties" in *Outland* was an integration negotiated by the two respective pilot groups—not by the company and one group.

[6] American professes dismay that the Board's action required the seniority question to be "submitted anew, as if no negotiations had occurred and as if no agreement had been reached." (Pet. No. 71-550, 10) In fact, the issue had not been "submitted" before and the "agreement" constituted a mere proposal.

[7] Indeed, it would follow from American's argument that even if the Board had decided to resolve the seniority issue itself, the Board was required as a matter of law to give priority consideration to the two-party agreement.

that the knowledge that compulsory arbitration is inevitable in the absence of agreement by all groups "will effectively impair the motivation of both majority and minority groups to reach reasonable agreements during negotiations". American's fears are groundless. Agreements have been reached in the past despite the "threat" of compulsory settlement by an arbitrator or the Board.[8] Out of a total of twenty-one prior flight crew seniority cases, settlement by agreement was reached in nine cases, by mediation in one, and by arbitration in ten. Record, 179a. In only one prior case (*Braniff-Mid-Continent Merger Case, supra*) has the majority representative had the temerity to assert the power to determine the rights of a minority group of employees by entering into a collective bargaining agreement with the carrier, and in that case the assertion was firmly rejected by the Board. Thus since 1952 seniority rights have been successfully determined by negotiation or arbitration despite knowledge by carriers and employees of the principles of *Braniff*.[9]

3. *No significant questions concerning unlawful delegation of the Board's decision-making responsibilities are involved.*

Relying on provisions of the Federal Aviation Act (49 U.S.C. 1301), Administrative Procedure Act (5 U.S.C. 556(b)) and Reorganization Plan 3 of 1961 (26 F.R.

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[8] Moreover, American's arguments concerning motivation seem equally valid where the parties have voluntarily agreed to arbitrate if no agreement is reached.

[9] *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962), relied on by American (Pet. No. 71-550, 10), does not point to a different result. In the present case, unlike *Burlington*, (1) the Board's order does not encroach on the jurisdiction of a sister agency, (2) the Board's order recognizes its lack of expertise in labor matters, and (3) in fashioning its standard conditions the Board not only weighed the consequences of allowing a majority group to override a minority group (*Braniff-Mid Continent-Merger Case, supra*), but arrived at a solution consistent with national labor policy.

5989), Petitioners argue that the Board can not lawfully delegate its decision-making power to private parties, such as an arbitrator, and that the provision here for settlement of the seniority issue by arbitration is therefore unlawful.

Petitioners misconceive the nature of the Board's action in providing for arbitration. The Board's responsibility under section 408 of the Federal Aviation Act is to decide whether a proposed merger arrangement is in the public interest. This responsibility it cannot delegate, and has not delegated. But having decided the statutory issue and approved the merger, it also has the power, and indeed the responsibility, to impose "such terms and conditions as it shall find to be just and reasonable". 49 U.S.C. 1378(b).

There is no prohibition in the Federal Aviation Act, or elsewhere, which precludes the Board from discharging its responsibility by providing, as it did in sections 3 and 13 of the labor conditions, for negotiation and, on failure to agree, arbitration, and such procedures are consistent with national labor policy. Although facts and circumstances in a particular case may render such an arrangement unjust or unreasonable, in the present case the court below correctly found that the Board's choice of arbitration was proper. The basic reasons are the Board's lack of expertise in labor matters [10] and the fact

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[10] American asserts that, while the Board may be inexpert in labor matters, it does possess peculiar knowledge of airline operations—and an evaluation of such issues is essential to resolving the existing dispute. Pet. No. 71-550, 14-15. The Board certainly does have expertise in the latter area—but so do a number of arbitrators, who *also* have expertise in labor matters. Unfortunately, Petitioner APA has made it plain, before the Board and in the Court below, that any arbitrator with such experience is unacceptable, and American has acquiesced in APA's view. App. A15, A16, A20. Petitioners should scarcely be allowed to rely on the expertise ground just because they elect to rule out any person or agency with expertise, except for the Board.

that seniority is basically a matter for negotiation or arbitration. (App. A37)

Petitioners' contention that reconciliation of the interests of labor groups is a decision-making function which cannot be delegated is inconsistent with their support of the principle of negotiation as a cornerstone of national labor policy. If the decision must be made by the Board, that responsibility cannot be "delegated" to the interested parties—American, APA and TCA-MEC—for settlement by negotiation and agreement, any more than it can be delegated to an arbitrator. Petitioners cannot have it both ways.

Petitioner American is also troubled by the fact that no "guidelines" have been prescribed by the Board. But as the court below points out (App. A20), the arbitrator "must apply the same standard, 'the integration of seniority lists in a fair and equitable manner,' by which an examiner of the Board would be bound." Both the Board and the court below found that "American's fears with respect to the conduct of the arbitration are exaggerated." (App. A19).[11]

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[11] American cites as indefinite issues the following: (1) the identity of employee representatives; (2) the method of arbitrator selection; (3) the issues for the arbitration; and (4) the location of the arbitration (Pet. 15-16). The contentions are ingenuous. First, long before the petitions were filed, TCA MEC agreed to supply signed authorizations from each individual pilot it purports to represent, eliminating the first "vexing" area. Second, long before the petitions were filed, the parties agreed on a method of arbitrator selection. If that method proves abortive—and if there is a dispute as to the Board's intention—any party has the right to return to the Board for a clarification order, but that is a far cry from putting the whole problem back in the Board's lap. Third, the issues to be arbitrated are spelled out in the Board order—"all pending disputes with respect to the seniority list integration of the American and TCA pilots and flight engineers." (App. A39). And fourth, the location of the arbitration is obviously a frivolous objection; that decision is seldom made until an arbitrator is chosen, and the arbitrator's preference is customarily given great weight.

4. *In any event the court below properly found that the appeal attacking the Board's "delegation" to an arbitrator was untimely.*

The order of the Board, Order 70-12-161, imposing protective labor conditions, including sections 3 and 13 relating to negotiations and arbitration, was served on December 31, 1970. Record, 24a, 134a, 137a, 140a. American's Petition for Review was filed on June 18, 1971, seeking review of two orders of the Board, dated May 7, 1971, and June 11, 1971, which sought to implement the order of December 31, 1970. No appeal was taken from the order of December 31, 1970.

If the Board lacks authority to "delegate" a seniority dispute to a non-governmental arbitrator, the Board's unlawful delegation occurred on December 31, 1970. American cannot take advantage of the merger approval and withhold appeal of particular provisions or conditions of the approval until such time as it decides they are disadvantageous. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. Clearly the question of the Board's legal power to "delegate" should have been appealed within the statutory 60-day period. 49 U.S.C. 1486(a). Having failed to do so, the arbitration provisions are unassailable on appeal.[13]

5. *The ruling of the court below that Petitioner APA is bound by the Board's order because of APA's intervention in the Board proceeding is correct, but in any event is not essential to the lower court's decision.* The Board has broad powers to deal with labor relation

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[13] It should be noted that the petition of the TCA MEC, filed February 2, 1971 (Record, 143a) to which both Petitioners refer, expressly stated that it was invoking condition 13 by demanding arbitration of a dispute that had existed for 30 days (i.e., since December 31, 1970). American and APA were thus on notice well in advance of the 60-day deadline that TCA MEC construed the order imposing the labor protective conditions exactly as did the Board and the court below.

problems growing out of airline mergers, and its order could not be frustrated by the failure or refusal of APA to intervene. As the court below said (App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real".

Moreover, the court's ruling on intervention is correct and unexceptionable. Petitioner cannot escape the normal and universal rule that a party in an adjudicatory proceeding, whether before a court or an administrative agency, is bound by the order of the tribunal or agency.[13] Orderly procedure so requires. It would indeed be intolerable to give opportunity to a party to present its evidence and contentions, and to reach a final order based in part on such presentation, only to discover that such "order" had no higher status than an advisory opinion with respect to some of the parties.

The argument that the ruling is novel and farreaching, and will discourage participation in administrative proceedings, seeks to prove too much. A merger proceeding fixes legal rights and obligations, and is not a mere fact-gathering investigation; nor does the greater "informality" of administrative agency proceedings negate the agency's authority to issue final orders determining such rights and obligations.[14]

Petitioner APA additionally but erroneously contends that the Board lacks jurisdiction to bind APA because

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[13] APA's strained distinction between intervention in a judicial proceeding and intervention in an administrative proceeding eludes us. APA *has* intervened in the litigation in the court below and is bound by *that* decision, without considering its status before the Board.

[14] Contrary to Petitioner's belief (Pet. No. 71-489, 27), the fact that *some* intervenors in administrative proceedings do not have an appealable interest is of no significance to the present controversy. Respondents here have not contested Petitioner APA's right to appeal from the Board's order.

it lacks jurisdiction over the "subject matter". Petitioner apparently means that the Board has power to approve merger agreements (and thus has jurisdiction over American), but has no direct statutory power to compel APA and other labor groups to arbitrate if negotiation fails (and thus has no jurisdiction over APA). But this ignores the fact that the "subject matter" includes labor protective conditions, that these are directed to American, and that the impact on APA derives from the directive to American. Having participated in the administrative process of formulating the order, APA is bound by it.[18]

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[18] Since the preparation of this brief, this Court on November 15, 1971, handed down its opinion in *Norfolk & Western Ry. Co.* v. *Nemitz*, No. 70-97. The Court there held that a pre-merger labor agreement, which had been approved by the Interstate Commerce Commission as part of the merger transaction and thus became one of the conditions of the merger, could not be abrogated by a subsequent implementing agreement between the employer and authorized representative which substantially and adversely modified the compensation to be paid a minority group of employees. Although the case involved specific statutory provisions of the Interstate Commerce Act (sec. 5(2)(f)), the Court's decision supports the action of the Board and the Court below in this case: (1) The responsibility of the Commission in a merger case to impose and oversee protective conditions for minority employees, despite efforts to override the interests of such employees through recourse to the collective bargaining procedures of the Railway Labor Act, is clearly established; (2) The subsequent implementing agreement (comparable to the APA-AA agreement here) was held to be unenforceable and contrary to the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1971, copies of the Brief in Opposition for Intervenor-Respondent Master Executive Council of the Pilots of Trans Caribbean Airways were mailed, postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-489

ALLIED PILOTS ASSOCIATION, PETITIONER

v.

CIVIL AERONAUTICS BOARD

No. 71-550

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12–A22)[1] is reported at 445 F. 2d 891. The opinions of the Civil Aeronautics Board (Pet. App. A32–A40, A25–A31) are not yet reported.

[1] "Pet. App." references are to the appendix to the petition filed by the Allied Pilots Association in No. 71-489.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23–A24) was entered on July 23, 1971. The petition for a writ of certiorari in No. 71–489 was filed on October 5, 1971; and the petition in No. 71–550 was filed on October 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board has the authority, in approving an airline merger under Section 408(b) of the Federal Aviation Act, to impose labor protective conditions which assure to responsible employee groups the right to binding arbitration of seniority disputes arising out of the merger.

2. Whether an order of arbitration by the Board may bind an employee group which has actively participated in the Board proceedings leading to issuance of the order.

STATUTES INVOLVED

Section 414 of the Federal Aviation Act (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1384) provides:

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

Sections 102, 408(b), and 1006(a) of the Federal Aviation Act of 1958 (72 Stat. 737, *et seq.*, as amended, 49 U.S.C. 1302, 1378(b) and 1486(a)) are set forth at Pet. App. A1–A6. Sections 1a and 2 Fourth of the Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C 151a and 152 Fourth) are set forth at Pet. App. A7–A8.

STATEMENT

On January 22, 1970, petitioner American Airlines ("American"), together with Trans-Caribbean Airlines ("TCA"), applied to the Civil Aeronautics Board for approval of American's acquisition of TCA. After full hearings, the Board, by Order No. 70–12–161 (J.A. 24a–44a),[2] approved the proposed merger.

During the hearings, there emerged sharp differences between petitioner Allied Pilots Association ("APA"), which represented American's pilots, and the Master Executive Council ("TCA–MEC"), which represented TCA's pilots, over the labor aspects of the acquisition. The dispute concerned integration of seniority lists in the merged airline. TCA–MEC asked the Board to order binding arbitration of this pilots' dispute as a condition to approving the merger, or, alternatively, to resolve the dispute itself (J.A. 40a, n. 24). The Board denied these requests as premature. But, in its order of approval, it imposed labor protective provisions identical to those which it had regularly imposed for the past decade in merger and route-transfer cases (Pet. App. A13). Section 3 of

[2] "J.A." refers to the Joint Appendix in the court of appeals, which has been filed with the Clerk of this Court.

these provisions required fair and equitable integration of the seniority lists of both carriers, through negotiation where possible.[3] Section 13 provided that, should the parties be unable to agree, either side had the right to refer the disputed matter to binding arbitration.[4] See J.A. 40a, n. 24. Both petitioners fully accepted the Board-imposed conditions on the merger. Neither of the companies, none of the unions, nor any other person sought reconsideration of the Board's order or otherwise objected to it.

After the Board's approval of the merger, American met with APA and TCA–MEC. American and APA agreed that seniority lists should be integrated on a straight date-of-hire basis, and that furloughed pilots should be recalled on a last furloughed-first recalled basis (Pet. App. A14). TCA–MEC, however, considered these terms unfair to its men and de-

[3] Section 3 reads: "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

[4] Section 13 reads: "In the event that any dispute or controversy (except as to matters arising under sec. 9) arises with respect to the protection provided herein, which cannot be settled by the carrier and the employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, etc., shall be agreed upon by the carriers and the employees, or the duly authorized representatives of the employees."

manded that the matter be submitted to arbitration. When American and APA refused, TCA–MEC petitioned the Board on February 2, 1971, to order the parties to submit the issue of seniority-list integration to final and binding arbitration (Pet. App. A32–A33). American and APA opposed on the ground that their agreement was fair and equitable (Pet. App. A14).[5]

While this petition was pending, American and TCA consummated the merger on March 8, 1971. Pursuant to its agreement with APA, American then integrated the active pilots on a date-of-hire basis and planned to recall furloughed pilots on a last furloughed-first recalled basis (Pet. App A33).

Thereafter, the Board, by Order No. 71–5–30 issued on May 7, 1971 (Pet. App. A32–A40), granted TCA–MEC's request for an order directing American to submit the seniority-list integration issue to final and binding arbitration (Pet. App. A36). The Board noted that, while it customarily imposed labor protective conditions in merger cases, its well-established policy was to leave resolution of disagreements concerning those matters to negotiation among the carriers and employee groups, or, negotiation failing, to arbitration (Pet. App. A36–A37). The Board disclaimed any expertise in labor relations and held that "seniority is basically a matter for negotiation or arbitration" Pet. App. A37). It observed that TCA–

[5] American, while opposing the TCA–MEC petition, conceded the Board's authority to order binding arbitration of the issue (Pet. App. A36). APA denied the Board's authority (Pet App. A35).

MEC's claims were not frivolous, created a *bona fide* dispute, and, under the labor protective conditions, entitled TCA–MEC to binding arbitration (Pet. App. A38).[6]

American, supported by APA, petitioned for reconsideration. Noting APA's assertion that no arbitration could affect its labor contracts with American, it claimed that arbitration was thus not feasible. The Board was asked to appoint a hearing examiner to determine whether the agreement that American had reached with APA provided a "fair and equitable method of seniority integration, and, if not, to prescribe the manner in which disputes concerning the method of integration should be resolved" (J.A. 206a, p. 1).

The Board, by Order No. 71–6–71 issued June 11, 1971 (Pet. App. A25–A31), denied reconsideration. It reiterated its preference for arbitration as a means of settling labor disputes, and it stated that there is no difference in the legal effect of ordering integration of seniority lists by arbitration or by the Board's own determination after hearings (Pet. App. A26). In either event, it pointed out (Pet. App. A26–A27),

[6] The Board specified that the order of the arbitration panel would bind all employees involved in the dispute (Pet. App. A40). To insure protection of the interests of all groups, the order gave all groups of pilots and flight engineers who desire to do so the right to participate in the arbitration; it also ordered that procedures be established to insure consideration of the interests of any employee groups that might choose not to participate (Pet. App. A39–A40). At the same time the Board denied TCA–MEC's request for interim relief blocking American's implementation of its integration plan (Pet. App. A38–A39).

any alteration of rights stemming from the American-APA collective bargaining agreement would be the result of the labor protective conditions, which are superior to any private contract. *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826.

On review, the court of appeals unanimously upheld the Board (Pet. App. A12–A22).

ARGUMENT

1. *a.* Both petitioners challenge the authority of the Board, as a condition of its approval of an airline merger, to order arbitration of a labor dispute at the behest of a labor group that does not represent a majority of the carrier's employees. Referring by analogy to the Railway Labor Act (45 U.S.C. 151a and 152 Fourth), which anticipates settlement of disputes without compulsory arbitration by negotiation between a carrier and the majority representative of the employees, they contend that the Board must be guided by similar principles in the present case (Pet. No. 71–489, pp. 14–17; Pet. No. 71–550, pp. 10–11). From this premise, petitioner APA apparently argues for a complete bar to an order of arbitration by the Board so long as the carrier and the bargaining agent of the larger of the constituent carriers can agree on a settlement (Pet. No. 71–489, pp. 16–17). Petitioner American, on the other hand, seems to take the position that the Board is required to examine all agreements between that carrier and bargaining agent; and it can order arbitration only

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if it determines that their agreement is not fair and equitable (Pet. No. 71–550, pp. 10, 12).

These contentions attack only the legality of the arbitration provisions in Section 13 of the labor protective conditions; they come months after consummation of the merger pursuant to the terms of the Board's order of approval. Consequently, petitioners' arguments are untimely and are no longer available to them. In any event, they are insubstantial and do not warrant further review by this Court.

(1) In its order of approval (No. 70–12–161), the Board stated (J.A. 40a, n. 24): "After the issuance of our order establishing labor protective conditions, we expect that the pilot groups will, in accordance with the views expressed herein, abide by the labor conditions' contemplation that the rights of both pilot groups should be protected by negotiated integration of seniority lists in a 'fair and equitable manner,' and that, in the event of failure of agreement, the dispute will be submitted to arbitration." [7] The parties, including APA, were thus on notice of the intended meaning and force of the imposed conditions at the time that the merger was approved. As already noted, no party sought clarification or took exception by peti-

[7] This is consistent with the usual practice involving labor protective conditions under the Interstate Commerce Act. See, *e.g.*, *New Orleans & Northeastern Railway Co.* v. *Bozeman*, 312 F. 2d 264, 268 (C.A. 5); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Railway Co.*, 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819. Similarly, it conforms to earlier Board orders in related fields. See, *e.g.*, *Braniff-Mid-Continent Merger Case*, 17 C.A.B. 19; *Airlift International, Inc. and the Slick Corporation*, Order #–26933.

tioning for reconsideration. To the contrary, American proceeded promptly to consummate the merger and commenced operations over the routes formerly served by TCA. It is agreed that American and its pilots thereby acquired valuable benefits. They should not now be heard to complain of the labor protective conditions on the basis of which they were permitted to acquire these benefits. As this Court stated in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502:

> In 1951, the condition before us became an important factor in securing the Commission's finding that the merger would be in the public interest * * *. After the merger was approved on that condition, respondent sought no review of it. On the other hand, respondent consummated the merger and has enjoyed its benefit ever since. It cannot now be allowed to attack an officially approved condition of its merger while retaining at the same time all of its benefits.

Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)) requires a party who wishes judicial review of a Board order to file a review petition in a court of appeals within sixty days after the entry of such order. Here, however, petitioners waited almost six months before requesting review of the order of December 31, 1970, containing the labor protective conditions they now contest. As pointed out by the court below (Pet. App. A19), they are thus foreclosed by statute from raising the arguments in their petitions. *Callanan Road Co.* v. *United States*, 345 U.S.

507, 512.[7] To be sure Section 1006(a) does permit the late filing of a review petition upon reasonable grounds shown, but petitioners have made no such showing for their extraordinary delay.[8]

(2) At all events, petitioners' challenge to the Board's authority to order binding arbitration is without merit. The Board has broad power under Section 408 (b) of the Federal Aviation Act (49 U.S.C. 1378(b)) to approve airline mergers "upon such terms and con-

[7] Since the merger order had been approved by the President under Section 801 of the Federal Aviation Act (49 U.S.C. 1461), because it involved the transfer of foreign routes, it may well be that no review was available to petitioners under 49 U.S.C. 1486(a). See *C. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103. Even if petitioners could bring themselves within the exception to *Waterman*, however, on the ground that they are claiming that the Board order was *ultra vires* (see *World Airways* v. *Pan American World Airways, Inc., et al.*, 391 U.S. 461; *American Airlines* v. *Civil Aeronautics Board*, 348 F. 2d 349 (C.A.D.C.), the time within which they could raise that claim had long since expired when this suit was commenced (see 49 U.S.C. 1486(a)).

[8] Indeed, APA offers no excuse other than that in the statutory period for review of the order it did not believe that the Board had really given TCA-MEC the right to arbitration (Pet. No. 71-489, p. 25). But the Board's order was entirely clear on this point, and, as subsequent events proved, it meant just what it said. Petitioner American contends that to have timely challenged the labor protective provisions would have been inconvenient, for American would have had to challenge "the entire merger for which it sought Board approval" (Pet. No. 71-550, p. 17). But American, of course, could have challenged only that part of the order to which it objected. And it was American which sought approval of the merger to begin with: one of the reasonable burdens it must bear as an applicant is timely objection to any Board action concerning the merger which it thinks unlawful.

ditions as it shall find to be just and reasonable." As petitioner APA concedes (Pet. No. 71–489, p. 14), this empowers the Board to impose conditions to protect the employees of the merging carriers. *Kent* v. *Civil Aeronautics Board*, 204 F. 2d 263 (C.A. 2), certiorari denied, 346 U.S. 826; *United States* v. *Lowden*, 308 U.S. 225. In the exercise of this power, the Board may prescribe compulsory arbitration as a means for resolution of labor disputes arising out of mergers, including disputes over seniority lists. See *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (C.A. 8), certiorari denied, 375 U.S. 819.

Nor is it precluded from doing so by the Railway Labor Act, which requires settlement of "major disputes" solely by voluntary procedures, but permits binding arbitration with respect to "minor disputes." See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33. It is doubtful whether the dispute here over integration of seniority lists can be considered of "major" proportions within the parlance of that statute. Even assuming that it can, however, the proscription against submitting such disputes to binding arbitration under the Railway Labor Act has no application in this case. Section 414 of the Federal Aviation Act (49 U.S.C. 1384) explicitly relieves "[a]ny person affected by any order" from "all other restraints or prohibitions made by, or imposed under, authority of law * * *." See *Brotherhood of Locomotive Engineers* v. *Chicago &*

North Western Ry., supra; cf. *Norfolk and Western Railway Company* v. *Nemitz,* No. 70–97, decided November 15, 1971, slip op. p. 4.

Moreover, despite the fact that it had full power to resolve the present dispute over seniority lists (see *Kent* v. *Civil Aeronautics Board, supra*), the Board quite appropriately chose to remit the parties to the traditional labor procedures of negotiation and arbitration (see Pet. App. A20, A21). It was never contemplated that, in the exercise of its responsibilities to impose just and reasonable conditions, the Board would sit as a labor tribunal to adjudicate every labor dispute connected with a merger. Moreover, as the Board candidly admitted in this case, it possesses no special expertise in labor relations. See *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.).

Thus, its decision here was an eminently reasonable way of insuring that, following the merger, the dominant group would not unwarrantably subordinate the interests of the acquired carrier's employees, who are now a minority. *Braniff-Mid-Continent, supra,* 17 C.A.B. at 21–22.[10] Indeed, this concern with the rights

[10] This, of course, does not mean that "any minority, no matter how small" (Pet. No. 71–550, p. 11), could, by its failure to agree, force compulsory arbitration. Indeed, the Board has specifically declined to order arbitration of a dispute over seniority-list integration when requested by dissatisfied non-representative minorities. See *Universal Airlines Company.* Order No. 71–9–24 (September 3, 1971); cf. *Outland* v. *Civil Aeronautics Board,* 284 F. 2d 224 (C.A.D.C.). Rather, its concern is with the grievances of genuinely representative minority groups that result from the Board's approval of a merger.

of the minority employee-group is coincident with the policies underlying the Railway Labor Act (*Steele* v. *Louisville & Nashville Ry. Co.*, 323 U.S. 192), and the pre-existing collective agreements between American and APA must yield to the paramount authority of the Board to effectuate a solution for the benefit of all employees affected by a merger. *Kent* v. *Civil Aeronautics Board, supra,* 204 F. 2d at 265–266.

Burlington Truck Lines v. *United States,* 371 U.S. 156, relied on by American (Pet. No. 71–550, p. 10), is not to the contrary. In that case, this Court set aside an order of the Interstate Commerce Commission, certifying a new trunkline carrier, on the ground that the Commission had not given adequate reasons to justify its grant of new authority instead of ordering the existing trunklines to handle all shipments. *Id.* at 167–168.[11] It noted that the Commission should consider the impact of its remedy upon national labor policy so as not to trench upon the jurisdiction of its sister agency, the National Labor Relations Board (*id.* at 173–174).

Here, by contrast, there is no problem of trespassing by the Civil Aeronautics Board upon the province of another agency expert in labor matters. The Board in fact deferred to the expertise of the National Mediation Board, stating that that agency was available to assist the parties in settling the dispute.

[11] The existing trunkline service was allegedly inadequate because of a labor dispute in which certain short-haul carriers became the target of a secondary boycott by the Teamsters Union. The National Labor Relations Board had found the boycott to be unlawful and had ordered that it terminate.

And, by leaving the seniority list dispute to negotiations and expert arbitration, the Board here, unlike the Commission in *Burlington*, avoided the danger of possibly contravening national labor policy "because of lack of expert competence" (371 U.S. at 173).[12] Thus, as the court of appeals stated (Pet. App. A18): "If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make."[13]

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[12] Contrary to the assertion of petitioner APA (Pet. No. 71–489, pp. 9–10), *McGuire* v. *Humble Oil and Refining Co.*, 355 F. 2d 352 (C.A. 2), is not in conflict with the decision here. Neither company to the merger involved in *McGuire* was subject to the jurisdiction of the Civil Aeronautics Board, and Board approval under the special provisions of Section 408(b) was not required for the merger. That case thus has no application to the wholly different situation presented by the airline merger involved in this case. Cf. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543.

[13] To the extent petitioners argue that, aside from the general applicability of the policies underlying the Railway Labor Act, special circumstances in this case make the Board's order of arbitration arbitrary, that argument is equally unpersuasive. The Board properly found that there was a "bona fide dispute of a non-frivolous nature" (Pet. App. A38) which could not be resolved by negotiation to the satisfaction of the three parties. In such circumstances, it is the Board's general policy to provide for arbitration (see n. 7, *supra*), and it did so here. In view of the Board's lack of expertise in these labor matters and, as the court below stated, the "exaggerated" (Pet. App. A19) nature of American's fears about the conduct of the arbitration, it cannot be said that the Board acted unreasonably in ordering the dispute to bind arbitration.

b. Petitioners' challenge to the Board's authority to delegate to an arbitrator the responsibility of resolving the labor disputes involved here (Pet. No. 71–489, pp. 18–22; Pet. No. 71–550, pp. 13–18) is also essentially an attack on the legality of Section 13 of the labor protective provisions of Order No. 70–12–161. As such, it is out of time under 49 U.S.C. 1486(a). Unlike *Oling* v. *Air Line Pilots Association,* 346 F. 2d 270 (C.A. 7), certiorari denied, 381 U.S. 926, on which petitioner APA relies (Pet. No. 71–489, p. 25), this is not a later suit contesting the fairness of the arbitration proceedings that were ordered by the Board, or disputing the arbitrator's award.

In any event, the contention that the arbitration requirement amounts to a delegation of the Board's functions misconceives the nature of the Board's responsibility. That responsibility is to impose conditions upon mergers which are appropriate for the protection of employees, and thereafter in proper circumstances to order compliance with them.[14] These responsibilities have been fully discharged by the Board (cf. *Norfolk & Western Railway Co.* v. *Nemitz, supra*); petitioners' contention that the Board itself must integrate the seniority list is merely a variation of the central theme that arbitration is not a proper remedy.

2. Finally, the Board has the power to bind APA by its arbitration order. Admittedly, it has power to bind the carrier (Pet. No. 71–489, p. 26). It also has

[14] This latter responsibility is equally that of a court to which application may be made by an employee for enforcement of the condition.

the responsibility under Section 408(b) to see to it that there is a resolution of labor problems arising from mergers which it approves. Cf. *United States* v. *Lowden,* 308 U.S. 225. APA was an active participant in the Board proceedings that led to the arbitration order of May 7, 1971. As pointed out by the court of appeals (Pet. App. A21): "To say that the Board could direct an arbitral resolution but not make that resolution binding on all concerned parties would leave the Board with powers that would be more apparent than real."

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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